MBf CAPITAL BHD & ANOR

v.

TOMMY THOMAS & ANOR (NO 11)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-52-1996]
19 MAY 1998

COMPANY LAW: *Suit by company - Security for costs - Whether parent company can provide security for subsidiary - Whether undertaking to pay defendants' costs sufficient - Whether parent company able to meet undertaking - Meaning of "credible evidence" - Companies Act 1965, s. 351(1)*

CIVIL PROCEDURE: *Security - Security for costs - Plaintiff company - Whether likely to be unable to pay costs of defendant - Meaning of "credible evidence" - Companies Act 1965, s. 351(1)*

The plaintiffs sued the defendants for damages in defamation relating to the utterance of words by the 1st defendant which the plaintiffs alleged were slanderous and which were later published in an international magazine. The alleged defamatory words related to the conduct of the plaintiffs and their counsel in relation to the administration of the Malaysian legal system. The 1st defendant was a partner in the 2nd defendant, a firm of advocates and solicitors.

The defendants applied for security for their costs, which amounted to RM1.22m in total, to be provided by the plaintiffs under s. 351(1) of the Companies Act 1965 ('the Act') and by consent, the applications were heard together.

It was not denied that the licence of the 2nd plaintiff, MBf Northern Securities, to deal in securities had been suspended on 12 May 1998 and it was prohibited from dealing in securities or holding itself out as carrying on that business. The plaintiffs conceded that the 2nd plaintiff was unable to meet costs awarded against it and confirmed that the 1st plaintiff had provided an undertaking to meet its costs. Thus, the only issue remaining was whether the 1st plaintiff could meet that undertaking.

The defendants relied on a newspaper report that the 1st plaintiff had announced a group pre-tax loss of RM586.6m and submitted that its precarious financial position did not enable it to meet the 2nd plaintiff's costs.

Held:

[1] The key words of s. 351(1) of the Act are that the court must be satisfied on "credible evidence" that the plaintiffs would be unable to pay the successful defendants' costs. In evaluating the evidence, the court must attempt to do justice to both parties.

[2] The word "credible" does not mean evidence tested at the forge of a trial by the fire of cross-examination. It suggests that it must be reasonably possible, based on the evidential burden of proof lying with the defendants, that the 1st plaintiff would be unable to pay the costs.

[3] The defendants relied heavily on the newspaper report to show the tremendous loss suffered by the 1st plaintiff. However, that same report also carried news that one of its wholly-owned subsidiaries had assets amounting to RM21.4 billion. It is trite law that a party cannot approbate and reprobate. The defendants could not rely on part of the report and reject that which was unfavourable to them.

[4] It was not possible to form a rational belief that the 1st plaintiff would be unable to pay the defendants' costs of RM1.22 million when it was shown by credible evidence that it had assets worth billions. Upon the whole of the evidence, the court was satisfied that the defendants had failed to discharge the burden of proof by producing credible evidence that the 1st plaintiff would be unable to pay their costs.

[5] The court therefore ordered that the 1st plaintiff was to provide security for costs in respect of the 2nd plaintiff only, for which the undertaking was sufficient security. The undertaking was to be filed in court within 48 hours of the date of the order.

[Order accordingly.]

Cases referred to:

Beach Petroleum NL & Anor v. Johnson & Ors [1991-92] 7 ACSR 203 ***(refd)***

Interchase Corp Ltd (In liquidation) v. Colliers Jardine (Qld) Pty Ltd & Ors [1995] 17 ACSR 447 ***(refd)***

MA Productions Pty Ltd v. Austarama Television Pty Ltd & Anor [1982] ACLC 404 ***(refd)***

Warren Mitchell Pty Ltd v. Australian Maritime Officers' Union & Ors [1993-94] 12 ACSR 1 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 351(1)

Corporations Law [Aust], s. 335(1)

For the plaintiffs - Dato' VK Lingam (Dato' V Sivaparanjothi & R Thayalan with him); M/s V Siva & Partners
For the 1st defendant - Raja Aziz Addruse (Darryl Goon & Robyn Choi, also as a partner of the 2nd defendant, with him); M/s Raja Darryl & Loh
For the 2nd defendant - Cecil Abraham (RS Nathan & G Rajasingam with him); M/s Shearn Delamore & Co
For K Anantham, a partner of the 2nd defendant - Pores Royan (Eugene Jayaraj with him); M/s N Navaratnam & Co

Reported by Anne Khoo

JUDGMENT

RK Nathan J:

The Application

My eleventh judgment in this case relates to the defendants' applications for security for costs. The 1st defendant filed encl. 109 whereby he sought from the 1st and 2nd plaintiffs and each of them security for the costs of this action with consequential reliefs. By way of encl. 106 the 2nd defendant, except for partners, namely Dato' Ranita bte Mohd Hussein, K. Anantham and the 1st defendant, sought from the 1st plaintiff, and by way of encl. 93 from the 2nd plaintiff, security for the costs of the partners of the 2nd defendant other than the three partners stated herein.

By way of encl. 115, K. Anantham, a partner of the 2nd defendant abovenamed, sought from both the plaintiffs security for the costs of this action. By consent parties agreed that I hear all enclosures together. Again by consent encl. 93 was taken first.

Case For The Applicants

Mr. RS Nathan for the 2nd defendant submitted that this application was made pursuant to s. 351(1) of the Companies Act 1965 (the Act) which reads:

> 351. Security for costs.
>
> (1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

He referred me to *Interchase Corporation Ltd (In Liq) v. Colliers Jardine (QLD) Pty Ltd & Ors* [1995] 17 ACSR 447 where Shepherdson J said at p. 448:

> The section requires me to answer two questions. In *Southern Cross Exploration NL v. Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114, 116 Waddell J described them thus:
>
> > The first may be described as a threshold question. It is, whether, having regard to the whole of the evidence before the court, there is credible testimony by which it appears that there is reason to believe that the plaintiffs will be unable to pay the costs of the defendants if successful in their defence. If this question is answered, yes, the second question arises which is whether, in the exercise of the discretion given to the court by the subsection, the relief sought should be granted wholly or in part or should be refused.

Incidentally our s. 351(1) of the Act is *pari materia* with the Australian s. 335(1) of the Corporations Law. In an attempt at satisfying the court as to what is meant by "credible evidence" Mr. Nathan referred me to *Warren Mitchell Pty Ltd v. Australian Maritime Officers' Union and Others* [1993-94] 12 ACSR 1 where Lee J said at p. 5:

> The use of the word 'credible' suggests a requirement that evidence to be relied upon has some characteristic of cogency. Qualification of the word 'testimony' by the word 'credible' suggests that an evidentiary burden is undertaken by the party seeking the order. It amounts to an obligation on an applicant for an order to show that the material before the court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings. To what extent the satisfaction of that standard may fall short of the demonstration of a likelihood that the corporation will be insolvent at the relevant time is unnecessary to decide. It is enough to say that speculation as to insolvency or financial difficulties likely to confront the corporation will be insufficient to ground the exercise of the discretion.

By way of further illustration Mr. Nathan pointed out that in *Beach Petroleum NL & Anor v. Johnson & Ors* [1991-92] 7 ACSR 203 Von Doussa J had said at p. 204 as follows:

> Although s. 1335 requires that there be reason to believe that the plaintiff corporation "will be unable to pay the costs of the defendant if successful" – and I emphasise "will be unable to pay" – the section does not, in my opinion, require that the court be satisfied, as a matter of probability, that every eventuality which could lead to eventual payment of the costs be excluded.

> The section would be satisfied if it appeared by credible testimony that there is reason to believe that if the defendant is successful circumstances may then exist in which the plaintiff will be unable to pay the costs.

He continued at p. 205:

> In my opinion the power of the court under s. 1335 arises if credible evidence establishes that there is reason to believe there is a real chance that events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs of the defendant on service of the allocatur, if judgment goes against it. This will be so even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay the costs. The degree of likelihood of the plaintiff corporation being unable to pay the costs along with all the circumstances, actual and possible, about its financial position, would be then taken into account in the exercise of discretion, and in framing the orders of the court if the decision is to order security.

It was pointed out to me that there were reports on 9 May 1998 in all the leading dailies that the 2nd plaintiff's dealer's licence has been suspended and that with effect from 12 May 1998 the 2nd plaintiff was to be prohibited from dealing in securities or holding themselves out as carrying on that business.

Dato' Siva then quite correctly conceded that it be taken that the 2nd plaintiff is, due to the suspension, unable to meet the costs and confirmed that the 1st plaintiff had, therefore given an undertaking to meet the costs of all the defendants in respect of the 2nd plaintiff, in the event the defendants are successful. He also pointed out that that undertaking was in encl. 126 as exh. GD-3.

On this concession, encl. 93 came to an abrupt end by all parties agreeing that the only remaining issue was the ability of the 1st plaintiff to meet the undertaking.

Enclosure 106

Mr. Nathan submitted that the basis of this application was that on 15 April 1998 the 1st plaintiff announced a group pre-tax loss of RM586.6 million. This evidence was obtained from a news report released by the 1st plaintiff and reported in the New Straits Times on 16 April 1998. The said report was exhibited as CYC-2 to the affidavit filed in support (encl. 106). Mr. Nathan then referred me to the plaintiff's affidavit encl. 104 (filed in response to encl. 93) and to exh. GD-2. This was the 1st plaintiff's unaudited results for the 12 months ended 31 December 1997. Under item 7 the report showed that

for the first six months the 1st plaintiff recorded an operating profit of RM18,094.000, whereas for the second six months the 1st plaintiff recorded a consolidated operating loss of RM172,440,000. He also pointed out from the said report a statement that the Group's earnings per share deteriorated by 289% from 38.4 sen to negative 72.4 sen in 1997. On this basis he submitted that the financial position of the 1st plaintiff was plummeting.

He therefore submitted that there was credible evidence that the 1st plaintiff is unable to meet the costs of the applicants if they are successful.

Regarding the 1st plaintiff's undertaking to pay the 2nd plaintiff's costs and whether such an undertaking constituted sufficient security, he submitted that the precarious position of the 1st plaintiff did not justify its ability to meet the 2nd plaintiff's costs if it was found liable. To a question from the court, Mr. Nathan said that the 2nd defendant's total bill was around RM350,000.00 (a skeletal bill for this sum was exhibited as CYC-5 to encl. 105 and as CYC-3 in encl. 93A).

Enclosure 109

Mr. Darryl Goon for the 1st defendant adopted Mr. Nathan's submission, and upon Dato' Siva confirming that the same concession regarding the inability of the 2nd plaintiff to pay applied to the 1st defendant, submitted that the 1st plaintiff itself had to provide sufficient security. He urged me to consider the fact that after 1997 the 2nd plaintiff's position is indicative of the group's shaky position, resulting in its suspension. He also urged me to consider that since to date the 1st plaintiff was unable to produce its audited accounts, this can only mean that its position is so untenable that it is unable even to audit its accounts whereas for the year ending 31 December 1996 the accounts were audited by 28 February 1997 as exhibited. Again to a question by the court he confirmed that the bill facing the 1st defendant was around RM600,000.

Enclosure 115

Mr. Navaratnam relied totally upon the earlier submissions by the other parties. It was again agreed by Dato' Siva that the same concession made by the 2nd plaintiff would apply for this enclosure. Mr. Navaratnam confirmed that his client was facing a bill amounting to RM270,000.

Case For The Respondents

In his joint reply to all the enclosures Dato' Siva pointed out that the total bills facing the plaintiffs in the event the claim is dismissed amounts to RM1.220 million. It was his submission that the undertaking given by the 1st

plaintiff in respect of meeting the 2nd plaintiff's costs, was sufficient and that there was no need for the 1st plaintiff to provide any security on its own behalf as it was well endowed with assets. Relying on *MA Productions Pty Ltd v. Austarama Television Pty Ltd & Anor* [1982] 1 ACLC 404 he urged me to consider the various factors considered by Needham J before deciding on the issue of security for costs, namely, the strength and the *bona fides* of the plaintiff's case, whether the application is oppressive and being used merely to deny the impecunious plaintiff a right to litigate, whether the lack of assets experienced by the plaintiff is caused by the default of the defendants and whether the order if made would stultify the plaintiff's actions.

He also urged me to follow this decision where the court held that a written undertaking given to the court by one of the directors constituted sufficient security. He also pointed out that in *MA Productions* the only asset which the plaintiff had was the potential earning capacity of the concepts it had formed. It had no other assets or income at all.

Findings Of The Court

It is obvious that these applications for security for costs are premised upon s. 351(1) of the Act. To my mind the key words contained therein are that this court must be satisfied based on "credible evidence" of the plaintiffs' inability to pay the costs of the successful defendants. In attempting to evaluate the credible evidence, the court must, so far as it is possible, attempt to do justice to both parties and in the course thereof not prejudice on the one hand the defendants by depriving them of the costs of having to wade through the murky waters of litigation, and on the other hand, the plaintiffs, by shutting them off from ventilating their complaints in court.

To my mind, both parties have failed to see the wood for the trees. The applicants have relied heavily on the report found in the New Straits Times dated 16 April 1998, to show the tremendous loss suffered by the 1st plaintiff. However that same report carried the further news that the 1st plaintiff's wholly owned finance company, namely MBf Finance Bhd has total assets amounting to RM21.4 billion, an increase from what it previously held amounting to RM19.4 billion. In addition it was reported that it has reserves of RM318.9 million bringing shareholders' fund to a total of RM1.33 billion.

It is trite law that a party cannot approbate and reprobate. The defendants cannot rely on part of the report and reject that which is unfavourable to them.

The word credible evidence does not mean evidence tested at the forge of a trial by the fire of cross-examination. It suggests that it is reasonably possible, based on the evidential burden of proof resting with the defendants, that the

1st plaintiff would be unable to pay the costs. I am satisfied that it is not possible to form a rational belief that the 1st plaintiff is unable to pay the total costs amounting to RM1.220 million when it has shown by credible evidence that it has assets worth billions. I accept the submission of Dato' Siva that for purposes of evaluating the credible evidence, it is necessary for the court to consider all other relevant factors that might have contributed to the unstable position of the party required to furnish the security. I see no reason to reject the unaudited accounts submitted by a public listed company as a sufficiently accurate reflection of the affairs of the said company. Upon the whole of the material before me I am satisfied that the applicants have failed to discharge the burden of proof by producing credible evidence that the 1st plaintiff will be unable to pay the costs of the applicants in the amounts estimated by them and totalling RM1.22 million.

Having heard all the arguments, I made the following orders:

(1) The 1st plaintiff was to provide security for costs in respect of the 2nd plaintiff only.

(2) The letter of undertaking given as shown in encl. 104 exh. GD-3 is sufficient to meet the costs of the defendants in the event they succeed.

(4) Costs of this application to the applicants.

(5) I directed that the 1st plaintiff was to provide an undertaking to the court to pay the 2nd plaintiff's costs in the event each and/or any of the defendants do succeed, and that such an undertaking was to be filed with the court within 48 hours from the date of my order.